No. 172.

Br. of De Gray, Grant & Rouse for Respondent (on rehearing)

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SUPREME COURT OF THE UNITED STATES.

No. 172.—October Term, 1899.

CITY OF NEW ORLEANS, Petitioner,

versus

JOHN G. WARNER.

Additional brief in support of the petition heretofore filed by John G. Warner by leave of Court, praying for a limited rehearing on the question of interest.

RICHARD DeGRAY,
WM. GRANT,
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Solicitors for John G. Warner.

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I.

The warrants issued in payment of the price of the drainage plant are in the form prescribed by the Legislature in the Act of 1871, as directed by the Act of 1876, authorizing the city to make the purchase. Each warrant was presented to the Administrator of Finance, and by him endorsed:

"Presented for payment June 6th, 1876.
(Signed) "E. Pilsbury, *Administrator of Finance.*"

They were offered, together with the certificate of presentation endorsed thereon, in evidence before the examiner (R., pp. 214, 215), without objection, and again in open Court at the

hearing (R., p. 205), also without objection, although the right to do so was reserved by agreement (R., p. 211). This evidence established the averment of the amendment to complainant's bill (R., p. 185), that the warrants had been presented for payment June 6th, 1876, but not paid, and entitled complainant to a decree for interest at the rate of 8 per cent. per annum from that date until paid, as prayed.

II.

But we do not understand that the city disputes the fact that the warrants were drawn in due form, and presented for payment, as shown by the evidence. Nothing to the contrary appears in the answer to the bill, or the assignment of error in this Court, nor was the contrary contended for in the oral argument. The contention is, both in defendant's answer to the amendment to the bill (R., p. 203), and in its brief on the merits, that the city is not liable for any interest at all. On this point the answer says "that whether or not the warrants on which complainant sues were or were not presented and endorsed as averred in said amended bill respondent has no knowledge, information or belief, but whether presented or not * * * this respondent is in no manner bound or liable in any manner on, for, or in respect to said warrants, and least of all for any alleged interest thereon."

The petition of the city upon which the writ of *certiorari* was granted, complains that the Court of Appeals erred, because "neither the Act of 1876, nor the contract of sale thereunder provides for payment of interest, and the stipulation for the payment of interest contained in the warrant was without authority of law. (See petition for writ of *certiorari*, page 25, Error 35.) The contention in petitioner's brief for the writ (p. 37) and in its brief on the merits (p. 35) is, that inasmuch as the Act of 1876 did not specially mention interest, the stipulation of eight per cent. from date of presentation was and is

ultra vires. No where is any suggestion or complaint made that the Court erred in allowing interest from June 6th, 1876. Indeed, under the undisputed proofs in the record, none could be made as to the date at which interest should commence to run.

III.

The constitutionality of the Act of 1876 authorizing the purchase of the drainage plant, and the payment of the price in drainage warrants "which shall be issued in the same form and manner as those heretofore issued to the transferee of said company under Act 30 of Acts of 1871, for work done", is not assailed; nor is it claimed that the warrants were not strictly drawn in the form prescribed by said Act of 1871, which provided that they should bear 8 per cent. interest from the date of presentation until paid. It seems to us that it was perfectly competent for the legislature to adopt the form of warrant in use under the prior Act of 1871, which included a provision for payment of interest, for there is no rule which forbids legislative bodies in passing a new Act, to adopt some part of another act by reference, and none is shown by counsel on the other side, and none can be. Says Dwarris on Statutes, page 602:

"Words in an act of Parliament (words of reference in a subsequent statute) will make a thing pass as well as if it had been particularly expressed in the act itself; *verba illata inesse videntur.* Clauses of reference, incorporating provisions of a former statute, take effect as fully as if they had been repeated and re-enacted in the body of the latter act, with relation thereto."

It follows that the stipulation for the payment of interest was expressly authorized by the Act of 1876. But if that Act had been entirely silent as to interest, we submit that an express authority to buy on credit, carries with it by necessary implication authority to stipulate for the payment of such interest as the law permits to be contracted for upon the same principle that authority to borrow money implies authority in the agent to pledge the

property of the principal to secure the loan. See Hatch vs. Coddington, 95 U. S., p. 48. It was therefore competent for the city, independent of the Act of 1876, to contract to pay interest, under the general laws of the State. Article 2924 of the Civil Code declares as follows:

"Interest is either legal or conventional. Legal interest is fixed at the following rates, to-wit:

"At five per cent. on all sums which are the object of a judicial demand, whence this is called judicial interest.

"And on sums discounted by banks, at the rate established by their charters.

"The amount of the conventional interest can not exceed eight per cent. The same must be fixed in writing.

"All debts shall bear interest at the rate of five per cent. per annum from the time they become due, unless otherwise stipulated. Civil Code, 1938.

"In contracts stipulating a conventional interest, it is due without demand from the time stipulated for its commencement until paid." Civil Code, Art. 1937.

The substance of these provisions of the Code is that parties may lawfully stipulate to pay interest at the rate of eight per cent., and that in the absence of any special agreement the creditor may receive five per cent. from the date his debt is due, but in the instant case the allowance of interest and the rate thereof is not ascertained by reference to the Civil Code, but is fixed specially by the legislature of the State.

We might show that in 1876, when these warrants were issued, eight per cent. was the usual and customary rate of interest on all time contracts in Louisiana, but it seems sufficient for us to suggest that it may be assumed that the rate fixed by statute was a reasonable one at the time. Indeed, when the character of the warrants is considered and the limited and uncertain provision made for their payment, the interest would seem insignificant. It is only now after more than twenty years spent in resisting the payment of its just debts that the city complains that the burden of interest which has accumulated through its own ne-

glect of duty, is more than it ought to bear. Not only has the city neglected to apply the taxes for which it was debtor to the payment of the warrants, but has persistently and actively obstructed the collection of those due by private persons, contrary to its covenant in the bill of sale. Certainly there is nothing in all this which will entitle the defendant to relief, even if a court of equity has the power to disregard and set aside the stipulations of a lawful contract, which we submit, it has not.

We respectfully submit that interest should be allowed on the complainant's warrants at the rate of eight per cent. per annum from June 6th, 1876, until paid, and that the decree entered herein be amended accordingly, and pray that the decree of the United States Circuit Court of Appeals be affirmed without qualification, and that appellant be condemned to pay all costs of the appeal.

RICHARD DEGRAY,
WM. GRANT,
J. D. ROUSE,
Solicitors for John G. Warner.

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Mr. of Peckham for Pltf. in Error

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THE CITY OF NEW ORLEANS

against

JOHN G. WARNER.

172

This was a *certiorari* from this Court to the Circuit Court of Appeals for the Fifth Circuit.

This Court in all respects affirmed the decree of the Circuit Court of Appeals except as to the *date* from which interest on the warrants should begin to run.

The decree (Record, p. 550) awarded interest on the warrants at the rate of 8 % from June 6, 1876.

This Court, in the opinion, thought that interest should not begin to run until the date of the filing of the bill, Nov. 26, 1894 (Record, p. 1). The *rate* of interest (8 %) was considered by this Court and as to the *rate* the decree below was affirmed (see Opinion).

The reason expressed by the Court for changing the date from which interest should begin to run was a good reason, had the record been such as the Court supposed it to be. That reason was that the warrants had not been presented for payment as provided by law, and that consequently there had been no demand for payment prior to the filing of the bill, which in itself, this Court said, constituted

a demand, and was the basis for the allowance of interest from that date.

Thereupon the respondent presented to the Court a petition for a limited rehearing on the ground that the Court had inadvertently overlooked an amendment to the bill specifically alleging the very presentation, &c., in 1876, which the Court assumed had not been done (Record, pp. 184–5), and also the proofs in support of such allegation (Record, p. 205).

The Court directed that such petition be filed, and allowed to both sides fifteen days to file any further briefs.

Points.

First.—We understand that the only question for discussion is the *date* from which interest shall run.

The respondent makes this application—not the City of New Orleans.

The respondent complained *only* that the Court had inadvertently fixed the wrong date.

When respondent asked leave to file that petition which raised only the question of the date from which interest should run, and the Court gave leave to file the petition for rehearing on question of interest only, and gave leave to counsel to file additional briefs within fifteen days, the Court surely referred to the question of interest raised in and by the petition.

The decision of the Court must be construed with reference to the question before the Court, and we submit with the

greatest confidence that by no possibility can the petition of the respondent for a rehearing on the question of interest only be construed as raising any other question than that the date from which interest should commence to run should be as directed in the Court below and not as stated in the opinion of this Court.

Second.—Assuming that such is the only question the decree of the Court below is plainly right and the modification by this Court an inadvertence.

The original bill (p. 1) contained no allegation of the presentment of the warrants for payment which we suppose to be the cause of the inadvertence into which the Court fell.

That defect in the original bill was cured by an amendment filed September 3d, 1897 (Record, pp. 184–185), which alleged presentment June 6, 1876, and prayed for a decree with interest from that date at the rate of 8% per annum.

The city of New Orleans, on October 30, 1897, filed two answers—one to the original bill (Record, p. 186) and one to the amendment (Record, pp. 202–3).

The answer to the amendment says, "That whether or not the warrants on which complainant sues were or were not presented and endorsed, as averred in said amended bill, respondent has no knowledge, information or belief," and it says nothing more or different with respect to such averment in the amendment to the bill.

That denial probably made a formal issue but it will be noted that the denial is not made in the positive manner which might be required of the city when its own act, at least in the matter of the endorsement, was in question.

The denial, if sufficient for a formal issue, is yet weaker in character when it is remembered that a copy of one of the warrants sued on was made part of the original bill (Record, p. 11, paragraph 14) and filed with said original bill (p. 109), with the words at bottom : "Presented for payment June 6th, 1876," at the foot and purporting to be signed by the city's financial officer—" E. Pillsbury, Administrator of Finance."

Proofs on this issue were taken by the complainant below.

On p. 205 of the Record it appears :

" Complainants offer in evidence the drainage warrants sued on in this case Nos. *together with the presentation of said warrants at the bottom of each.*"

True the record does not there state that the three warrants, &c., were *received* in evidence; but the statement as to the warrants, presentation, &c., is the same as the statement as to every other piece of evidence offered by each side (Record, pp. 205 to 211 inclusive).

That all the proofs so referred to as offered in evidence were read in evidence does conclusively appear from "Agreement as to Transcript" (Record, p. 213) where, among other things, it is agreed that the three warrants may be omitted

from the transcript because of a specimen copy being already printed.

See also under head of Complainant's Evidence (Record, p. 214): "Drainage warrants sued on, Nos. *together with the presentation of said warrants at the bottom of each.*"

And at top of p. 215 the "*Note*" that the three drainage warrants sued on may be omitted from the transcript because already printed, &c.

We thus find that the proof is ample and conclusive that the warrants were presented June 6, 1876.

It consists of the act of a public officer in writing on the warrants what the law required him to write.

Sec. 8 of Act No. 30 of 1871 made it the duty of the Administrator of Finance to pay drainage warrants on presentation, or, in default of payment for lack of funds, to endorse upon the warrant the date of presentation, after which the warrant should draw interest at the rate of 8% per annum.

See p. 11 of copy Acts of Legislature filed with the Court on the argument.

Sec. 3 of Act No. 16 of 1876 provides that the property purchased thereunder shall be paid for in *drainage warrants* which shall be issued in the same form and manner as those issued under Act 30 of 1871, and that they shall be payable out of drainage assessments and shall be issued so soon as any agreement shall have been completed.

See pp. 15 and 16 of said copy acts.

What higher evidence could there be that the warrants had been presented for payment, and there being, as claimed by the city, no funds, had been endorsed as presented according to law?

Clearly these allegations and these proofs had been overlooked by the Court, and on the argument no point of the kind had been raised or made by counsel for the city.

Third.—The necessary and inevitable result is that the decree below must be affirmed *without any modification* unless the City of New Orleans can point to some proofs in the record showing that the warrants were not presented in 1876.

There is no such proof, and we do not imagine that it will be claimed that there is.

Fourth.—If the City of New Orleans claims that the question whether *any* interest should be allowed is now open for discussion, and should be discussed, as we understand that it will, we submit that such claim is without foundation.

That question was argued on the original hearing. It is argued in the brief of counsel for the city on the petition for a *certiorari*, p. 3, last paragraph, and that brief was used on the argument of the case on return to the writ of *certiorari*.

It was discussed in point IX, p. 100, *et seq.*, of the brief submitted by Messrs. De Gray, Rouse and Grant, and it was discussed in the XIII point, p. 37, *et seq.*, of the brief submitted by Messrs. Rouse & Grant.

The writer of this brief has before him his own manuscript notes according to which he orally argued the same point.

This Court in its opinion discusses and decides that point.

The City has presented no petition asking for a reargument on that point, and no one has suggested that on that point anything in or out of the record has been overlooked by the Court.

Without a petition showing some inadvertence — something overlooked - surely no reargument can be had.

This rehearing on our petition in all conscience must be restricted to the single point whether as matter of fact the record shows that the warrants were presented on June 6, 1876.

Fifth.—But if the City of New Orleans could raise the question whether it is liable for any interest, it is too trivial for serious consideration.

For what are the very gist and substance of the adjudication in this case but that the City of New Orleans on the 6th day of June, 1876, was guilty of a wrong and a breach of trust when it refused to pay these warrants?

It then had in hand as between it and the warrant holders, as this Court has now

held, all the assessments against the City.

It then and thereafter, as this Court has held, instead of doing its best to further and not to impede the collection of warrants, did all it could to impede such collection.

Statute or no statute; in law or equity is there a Court in the world which given those premises, would not in some form, whether of damages or interest, compel a defendant to make good the loss occasioned by his wrongful delay?

Would any one pretend that compensation had been made—that justice had been done by a mere rendition of the original sum and nothing for these twenty-eight or nine years of delay and litigation?

Surely no such proposition should even be entertained.

In the matter of these drainage warrants the City of New Orleans has exhausted every possible line of defense, and we submit should now address herself to the problem of payment rather than of further and hopeless litigation.

Sixth.—The judgment of this Court we submit should be that the decree below be affirmed, *with costs*, as respondent's success is then complete, and that the death of the complainant Warner since the argument having been suggested on the record that the judgment be entered *nunc pro tunc* as of the day of the argument.

WHEELER H. PECKHAM,
Of Counsel for Respondent.